72-458

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MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-458

HOSPITAL TELEVISION, INC.,
a Corporation,
Petitioner,

v.

WELLS TELEVISION, INC., a Corporation, and TISHMAN REALTY & CONSTRUCTION COMPANY, INC., a Corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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To the United States Court of Appeals for the Eighth Circuit

The petitioner, Hospital Television, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on June 22, 1972.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Eastern District of Missouri.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on June 22, 1972. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether, upon proof of action forbidden by the antitrust laws, the right of a treble damage plaintiff to a jury trial includes the right to present to the jury estimates in actual dollars of lost income resulting from the defendant's unlawful conduct?

2. Whether "customer satisfaction" is a good defense in a treble damage action for violation of the antitrust laws?

STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 1;

15 U.S.C. § 2;

15 U.S.C. § 15;

28 U.S.C. § 2106.

STATEMENT OF THE CASE

Petitioner was organized in 1959, and is engaged in the business of furnishing hospitals in the St. Louis area with patient television rental service. Before organizing petitioner, Mrs. Dorothy Dennis worked as a saleslady for another firm, Hospital Television Services, Inc., of St. Louis, which was engaged in the same business as petitioner. By March 1, 1960, Mrs. Dennis had switched four

local hospital accounts from her former employer to petitioner and was supplying a fifth hospital. She was an incorporator and one of three stockholders of petitioner and is now the sole stockholder.

In December 1959, Jay and Arnold Wells, New Yorkers who had a national chain organization engaged in leasing TV equipment to hotels and motels in twenty-five states, approached respondent Tishman Realty & Construction Co. ("Tishman"), a listed corporation on the New York Stock Exchange, headquartered in New York, to purchase the Wells business. Tishman formed a wholly owned subsidiary and bought the Wells' holdings for $1,200,000 and one-fifth of the stock of the subsidiary.[1] Originally named Tishman Television, Inc., the subsidiary was later renamed Wells Television, Inc. ("Wells"). Within nine months, Wells purchased television service companies having over 250 hospital accounts over the country. On March 15, 1960 Wells acquired from Ball Radio of St. Louis its eleven hospital accounts. Soon thereafter, Wells acquired from Hospital Television Services, Inc., Mrs. Dennis' former employer, its eight hospital accounts. Tishman furnished or procured the necessary funds for Wells to commence business and carry out its acquisition program. Initially, Tishman lent Wells $800,000, and later lent Wells an additional $935,000 in the form of open non-interest bearing loans. In all, Tishman backed lines of credit for Wells at various banks aggregating $4,600,000, subordinating the Tishman loans to Wells to the lines of credit. By mid-1971, Wells had some 500 hospital accounts.

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[1] The opinion of the Eighth Circuit inadvertently describes Tishman as "Tishman Realty & Investment Co. of St. Louis". In fact, among many other apartment buildings, office buildings and shopping centers owned and operated by Tishman throughout the United States, Tishman owned and operated a luxury apartment house in St. Louis (Appendix p. 4).

Wells had original authorized capital of 100 shares of no-par stock. Tishman paid $800 for the original issue of 80 shares. Arnold and Jay Wells paid $200 for their 20 shares. In 1968, Wells increased the aggregate number of its authorized shares and declared a stock dividend. In 1968, Tishman distributed, in a spin off to its shareholders, the shares of new Wells stock received as a result of the stock dividend. At the time of the spin off, the value of Tishman's $800 investment had increased to $1,026,798. The value of Arnold and Jay Wells' $200 investment had increased to $256,700.

Wells' standard contract with its hospital customers contained three clauses, *inter alia,* (1) a "right to match" provision giving Wells the option to meet any competitor's proposal made to one of its hospital accounts on the expiration of the Wells' contract; (2) a "not permitted" provision prohibiting any patient from bringing a TV set into the patient's hospital room; and (3) an "evergreen" clause requiring a 180 day prior notice requirement to terminate an expiring contract the failure to give which resulted in its automatic renewal. In addition, beginning as early as 1960, Wells offered to install master TV antenna systems in hospitals with which it did business in the St. Louis area. Subsequently, Wells entered into 15 contracts with 14 hospitals, pursuant to which Wells installed and maintained antennna systems. Wells tied the contracts for antenna systems into its contracts with hospitals to furnish patient television rental service, thereby extending the length of the TV rental service contracts. The terms of the contracts were 84 months in two cases, 72 months in twelve cases, and 60 months in one case, a 1971 contract. The contracts were in effect during the period preceding the bringing of petitioner's action in 1969.

At the time of the filing of this action in 1969, Wells had 17 hospital contracts in St. Louis, while petitioner

had four and six were self-operated or held by other rental concerns. There were 27 hospitals in the St. Louis area that were potential users of TV for their patients on a rental basis.

At trial, Arnold Wells, executive vice president of Wells, testified:

> "Well, you have to understand how our business was built. It was built because we acquired companies who are local people, and those people stayed with our company, and are still with us today, except in one instance. And those people know their area and know their territory, and know their customers better than we do. And it was important that they continue to service those people, service those customers, service those hospitals, and we have confidence in them. They are our man—they are our person on the scene and we believe in them, that's why they are there, and doing well."

Robert Tishman, president of Tishman, testified:

> "During or after the acquisition, in the course of our policy discussion . . . the hospitals was presented to us as a large field; many hospitals, many beds, many opportunities, because the television leasing . . . had not been introduced into hospitals on any large scale throughout the country and that was the rationale for entering into the hospital field."

In 1969, petitioner succeeded in capturing a hospital account with St. Joseph Hospital of St. Charles, Missouri, which had formerly been a Wells account. When advised of petitioner's success, Arnold Wells sent Clifford Smith, his St. Louis manager, a memorandum: "Cliff, sorry but now want you to push her out of her St. Louis hospitals or let's buy her." Previously, Wells had attempted to buy out petitioner, and on six occasions had contacted Evenview, another patient hospital television rental con-

cern with one account in the St. Louis area, in an attempt to purchase Evenview.

Petitioner brought action against Wells and Tishman under §§ 1 and 2 of the Sherman Act, alleging that the Wells-Tishman acquisition program, the introduction of the financial power of Wells and Tishman into the St. Louis market, the restrictive provisions of the Wells' form contracts, and other undisputed business practices of Wells in the St. Louis area constituted the creation, by acquisition, and exercise and retention of monopoly power, a combination in restraint of trade, or a combination and attempt to monopolize the trade of furnishing hospital patient television rental service in the St. Louis area.

At trial, petitioner introduced uncontradicted evidence tending to show that where competition existed among competing suppliers of patient television rental service, hospitals obtained contracts in which they received as rental a greater percentage of monies paid by patients to rent televisions, than in the case where competition among prospective suppliers did not exist. The charges paid by petitioner's hospital patient customers were lower than the charges paid by Wells' customers. The administrators of Wells' hospital customers testified on Wells' behalf and expressed general satisfaction with Wells' services. One hospital administrator testified that the whole business of selecting a patient television supplier always seemed like a non-competitive thing. His arrangement with Wells was a smooth operation and he liked it that way.

At trial, Mrs. Dennis estimated that but for Wells' and Tishman's alleged wrongful conduct in acquiring petitioner's competitors and entering into long term contracts, petitioner would have obtained all of Wells' 17 hospital contracts in St. Louis. Dr. Barnett, petitioner's expert economist witness, testified that petitioner might have obtained up to 50 per cent of Wells' hospital contracts,

but for Wells' conduct which he, as an economist, concluded to be in restraint of trade.

Petitioner's expert witness, Carl Carlie, a certified public accountant, prepared an exhibit for the guidance of the jury in which he used Wells' income derived from its St. Louis accounts, and petitioner's expense experience to estimate petitioner's lost income, in actual dollar figures, had petitioner obtained 25, 50, 75 or 100 per cent of the Wells' hospital accounts, for each year covered by the complaint. Adding the yearly additional estimated income for the years beginning with the fiscal year ending June 30, 1966, petitioner would have had increased aggregate income of $392,000 had it obtained all of Wells' accounts, $270,000 had it obtained 75 per cent, $162,000 had it obtained 50 per cent, and $71,000 had it obtained 25 per cent. Over petitioner's objection, the trial court refused to allow Carlie to testify orally to his estimate of lost income for any year, and refused to allow petitioner to introduce the exhibit containing the estimates in evidence. The tral court limited the evidence concerning lost income to a presentation for the years involved, of Wells' and petitioner's gross revenues and their net before taxes expressed as a percentage of gross sales. The trial court said "The jury is just as able to draw a line as to the percentage of the hospitals that she [Mrs. Dennis] might have obtained for those years as you [counsel for Hospital] are."

The evidence was undisputed that commencing at least in 1965 Mrs. Dennis hired sales help and attempted, without success until 1969, to compete with Wells for its St. Louis hospital accounts.

Petitioner did not file a motion for a directed verdict. Over petitioner's objection, the court instructed the jury, *inter alia*:

> "If you determine that the defendants, or either of them, have violated the antitrust laws in the line of

commerce in the relevant geographical market area, then you must direct your attention to the question of whether or not the defendants' violations of the anti-trust laws are or have been the proximate cause of any injury to the plaintiff's business or property (Emphasis supplied).

"If you find that the injuries to plaintiff's business or property, if any, were not the proximate result of any unlawful acts or omission on the part of the defendants, but were caused by plaintiff's own failure to solicit business, or the tendency of customers to remain with a reputable and well-known supplier, or satisfaction by the customer with its television supplier, or the ability of defendant Wells to furnish the type of quality of equipment desired by the customer, or the tendency of a supplier to remain with the customer after the supplier has made a substantial investment in a master antenna system, then, in any of such events, your verdict must be for the defendant."

The jury rendered a general verdict in favor of respondents and petitioner did not file a motion for a new trial. In the Court of Appeals, petitioner argued, *inter alia*, that the refusal of the trial court to admit evidence of actual dollar damage estimates, and the quoted instructions, had the effect of leaving the jury so much at sea that it could not intelligently determine the extent of any damage to petitioner caused by respondents' actions. Taking the view that petitioner did not attack the presumed finding of no liability by the jury, the Eighth Circuit declined to review petitioner's complaint against the ruling of the trial court barring introduction into evidence of Carlie's estimate of petitioner's damages and the instructions complained of. The Eighth Circuit said: "Since the Court's instructions required a decision on liability first, it is fair to assume that it [the jury] never reached the damage issue" (Appendix p. 8).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With the Public Policy of the United States as Expressed by the Congress and in Prior Decisions of This Court and Threatens the Effectiveness of the Private Antitrust Action as a Vital Means to Enforce the Antitrust Policy of the United States.

The mere statement of this case in the opinion of the Eighth Circuit below (Appendix pp. 4-5) goes far to show that respondents' conduct in the St. Louis market met most of the tests to determine the existence of a rare, classic and successful combination to monopolize by acquisition. However, the opinion of the Eighth Circuit overlooked three additional material facts: the evidence of respondents' purpose to buy up local markets, quoted from the lips of their principals, Messrs. Wells and Tishman; the fact that Tishman was not a St. Louis business but a giant, wealthy New York corporation, whose resources dwarfed those previously committed to the St. Louis market and enabled Wells to enter and instantly dominate the St. Louis market through two acquisitions; and the fact that Wells foreclosed competition by tying its TV rental contracts to long term contracts to install and maintain master TV antenna systems in the hospitals Wells served, the existence of which during the period preceding the suit made attempted competition an exercise in futility.

By their 1960 acquisitions, respondents acquired and thereafter retained some 60 to 70 percent of the St. Louis market. If this did not constitute outright monopoly, at the very least, respondents' activities restrained trade in the St. Louis market, and respondents admittedly attempted to enhance their already dominant position by attempting to purchase both petitioner and Evenview. Respondents' intentional conduct was forbidden by the

antitrust laws. **U.S. v. Aluminum Co. of America**, 148 F. 2d 416 (2d Cir. 1945); **U.S. v. Griffith**, 334 U.S. 100, 68 S. Ct. 941 (1948).

In an era of skyrocketing hospital costs, who speaks in this court for the class composed of hospital patients interested in the lowest possible cost of hospital care and TV service as a part thereof? Petitioner here represents that class. Respondents do not. cf. **Thomason v. Hospital TV Rental, Inc.**, 272 F. 2d 263 (8th Cir. 1959). For want of competition in the TV rental business, hospital patients have had to pay Wells' price to rent a TV set, without being able to bring in their own sets from home.

The Eighth Circuit declined to review petitioner's objections to the refusal of the trial court to admit into evidence petitioner's estimate of lost profits, and the refusal of the trial court to uphold petitioner's objection to Wells' requested "customer satisfaction" defense instruction. The Eighth Circuit explained that "the jury found the issue of liability against [petitioner] and no attack is made on this finding" (Appendix p. 3). The Eighth Circuit misconceived petitioner's position. It was and is petitioner's contention that where, as here, proof of violation of the antitrust laws is overwhelming, the jury must and should have found that the violation caused injury to competitors within range such as petitioner, and that the complained of rulings by the trial court deprived the jury of a rational basis for assessing damages.

The Eighth Circuit paid insufficient heed to a besetting problem in private antitrust litigation: the difficulty of proving damages despite a clear showing of violation of the law. It is time for this court to clarify the law with respect to evidence of estimated damages in antitrust actions and the instructions complained of, to assure the continued viability of the civil antitrust remedy. As this court said in granting certiorari in **Perma Life Mufflers v.**

International Parts Corp., 392 U.S. 134, 136, 88 S.Ct. 1981 (1968), the "rulings of the Court of Appeals seemed to threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States."

2. **The Decision Below Denied a Full Jury Trial to Petitioner, in Conflict With the Settled Rule of This Court.**

At trial, petitioner sought to introduce the testimony of Carl Carlie, a certified public accountant, concerning estimated net income which petitioner would have derived yearly had it obtained 25, 50, 75 or 100 per cent of the business enjoyed by Wells in the St. Louis market following Wells' 1960 acquisitions and the institution by Wells of long term contracts with its hospital customers. In that the existence of Wells' long term contracts substantially foreclosed competition during the period involved, it was an exercise in futility for petitioner to solicit Wells' accounts from one year to the next. The trial court refused to allow Carlie to testify to any or all of his yearly income estimates, and refused to allow petitioner to introduce a written exhibit by Carlie, which set forth his estimates.

To determine any damages at all, the jury had to consider four sets of figures: Wells' and petitioner's gross revenues, and their net before taxes expressed as a percentage of gross sales. This would have been a demanding exercise for a jury composed solely of certified public accountants; it was an impossibly complex task for a contemporary federal jury.

But for Wells' acquisitions, petitioner would have continued in competition with its local competitors. The existence of respondents' unlawful combination over a period of time to eliminate competition was so clear as in itself to constitute proof of damage and a restraint resulting in some loss of business. **Union Carbide & Carbon Corp. v.**

Nisley, 300 F. 2d 561, 579-580 (10th Cir. 1962). Petitioner had no way to show that damage, other than the estimate of its witnesses by oral or written evidence. To deny petitioner the right to present such evidence, as occurred in this case, is to take away petitioner's remedy for a plain violation of law. The action of the trial court abrogated petitioner's right to have the jury pass on its claim. As this court noted in granting certiorari in **Beacon Theatres v. Westover**, 359 U.S. 500, 501, 79 S. Ct. 948 (1959): "Any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."

The ruling of the trial court conflicted with the views of this court in **Story Parchment Co. v. Paterson Parchment Paper Co.**, 282 U. S. 555, 565-566, 51 S.Ct. 248 (1931): "[T]he constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery."

It is time for this court to reassert the proposition, announced in **Bigelow v. RKO Radio Pictures**, 327 U.S. 251, 265, 66 S.Ct. 574 (1946):

> "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created . . ."

The correct rule, so far disregarded, appears in **William H. Rankin Co. v. Associated Bill Posters of U.S.**, 42 F. 2d 152 (2d Cir. 1930), cert. denied, 282 U.S. 864, 51 S.Ct. 37. There the court indicated that the preferable procedure to show damages is that attempted by petitioner in this cause: the testimony of petitioner's principal, Mrs. Dennis, and that of an expert witness, Mr. Carlie.

If petitioner had introduced sufficient evidence of violation of the antitrust laws by respondents to withstand

respondents' motion for a directed verdict, upon which in fact the trial court reserved judgment, the trial court should have allowed petitioner to make a full and fair presentation to the jury of the entire cause.

3. The "Customer Defense" Instruction Granted by the Trial Court Conflicts With Prior Decisions of This Court and Other Circuits.

Throughout the trial, respondents introduced evidence of customer satisfaction with Wells' service. At respondents' request, and over petitioner's objection, the trial court gave the instructions quoted at p. 7 of this petition.

On appeal to the Eighth Circuit, petitioner contended that, in effect, the trial court had elevated customer satisfaction to the status of an intervening cause, the mere existence of which hallows soft competition and could bar recovery for even an admitted violation of the antitrust laws. Moreover, if the "customer satisfaction" defense be deemed a form of affirmative defense the unusual form of the instruction left the burden of proof unclear, and implied that petitioner had the burden of showing that as to each hospital account its competitive efforts outweighed the satisfaction of Wells' customer.

The Eighth Circuit declined to address this issue, in an opinion inconsistent on its face. The opinion correctly notes that Wells entered the St. Louis market by acquiring 19 hospital accounts from two St. Louis competitors of petitioner (Appendix p. 4), and that at the time of trial, Wells had only 17 hospital accounts. Thus, in the period 1960-1969, Wells merely protected the monopoly it had achieved, and did not grow. But the opinion of the Eighth Circuit goes on to recite with implicit approval the unwarranted instruction obtained by Wells which allowed the jury to find for Wells if Wells' non-existent "growth

was through superior management, etc."[2] (Appendix p. 6). Taken in conjunction with the trial court's instruction on proximate cause the "customer satisfaction" instruction imposed an impossible and unwarranted burden of proof of causation on petitioner, never before approved by any court. It has been settled law hitherto that a plaintiff need only show that an antitrust law violation was "a" proximate cause. The plaintiff need not show that the illegality was a more substantial cause than any other. **Perma Life Mufflers, Inc. v. International Parts Corp.**, 392 U. S. 134, 143, 88 S.Ct. 1981 (1968) [concurring opinion of Mr. Justice White]. In addition, the instruction went far toward establishing the "customer satisfaction" defense specifically rejected by the Seventh Circuit as irrelevant to the issues of monopoly, intent and damages. **U.S. v. General Motors Corporation**, 121 F. 2d 376, 406 (7th Cir. 1941); see **U.S. v. Aluminum Co. of America**, 148 F. 2d 416, 427 (2d Cir. 1945).

The failure of the Eighth Circuit to come to grips with the real threat to the viability of civil antitrust litigation in the classic case of encysted monopoly power here presented will, if upheld, leave the enforcement of the antitrust laws in such cases as this solely to the discretion of the Justice Department or the Federal Trade Commission, in clear violation of the public policy of the Congress to enforce the antitrust laws through private litigation. Where neither such agency has seen fit to explore the little known market here involved and bring respondents to book, it is not only petitioner who has suffered, but the public and the hospital patients who have been the victims of respondents' restraint of trade. Under its inherent power as a court of equity and pursuant to the

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[2] The statement in footnote 3 of the opinion that "there was no objection to the [customer satisfaction] charge" is puzzling because petitioner very strongly and specifically objected to the charge before the trial court gave it (Appendix p. 6).

authority granted by 21 U.S.C. § 2106, this court in the interests of justice should itself exercise its jurisdiction to review the issues presented to but not passed on by the Eighth Circuit, or remand this case for such review.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted

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September 20, 1972

APPENDIX A

STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 1 provides:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . ."

15 U.S.C. § 2 provides:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . ."

15 U.S.C. § 15 provides:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained . . ."

28 U.S.C. § 2106 provides:

"The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

APPENDIX B

Opinion

UNITED STATES COURT OF APPEALS
for the Eighth Circuit

No. 71-1475

Hospital Television, Incorporated, A Corporation,
Plaintiff-Appellant,
v.
Wells Television, Incorporated, A Corporation, and Tishman Realty and Construction Company, Incorporated, a Corporation,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: April 10, 1972.
Filed: June 22, 1972.

Before MR. JUSTICE CLARK,* VOGEL, and LAY, Circuit Judges.

MR. JUSTICE CLARK:

In this treble damage action filed by Hospital Television, Inc. under the federal antitrust laws, the jury found

* Associate Justice Tom C. Clark, United States Supreme Court, retired, is sitting by designation.

against H.T.I., and it raises four points of error on this appeal. The case was tried to the jury on the rule of reason doctrine announced by Chief Justice White in *Standard Oil Co.* v. *United States*, 221 U.S. 66 (1911). On the issue of the liability under Sections 1 and 2 of the Sherman Act[1] of the appellees, Wells Television, Inc. and Tishman, appellant says that the refusal of the trial court to admit in evidence a diary of longhand notes made by Cidney Dade, an employee of appellant, outlining his efforts to secure hospital TV accounts, was erroneous. On damages, it claims that the court erred (1) in limiting the period of recovery to the four-year period immediately prior to the filing of the suit; (2) in restricting the instructions on causation to *the* proximate cause of the injury rather than *a* proximate cause thereof; and (3) in excluding from evidence a damage study made by an expert witness. A study of the entire record has been necessary because of the lack of a motion for a new trial as well as an appendix on the issues raised. In addition the briefs stress the facts in the case, the appellant devoting 60 percent of its main brief and practically all of its reply brief thereto and appellee devoting half of its brief to the same. The jury found the issue of liability against the appellant and no attack is made on this finding. As to the refusal of the court to admit the diary of Mr. Dade in evidence, we find no error. A study of the District Judge's charge to the jury reveals it to be quite adequate on the issue of liability. The jury having found no liability, we

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[1] 15 U.S.C. §§ 1 and 2:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .

"§ 2: Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . ."

do not reach the damage issues raised and affirm the judgment.

1. The facts indicate that appellant was organized in 1959 and is engaged in the business of supplying hospitals in St. Louis and vicinity with TV sets for the use of their patients on a rental basis. Prior to organizing appellant, Mrs. Dorothy Dennis worked as a saleslady for Hospital Television Services, Inc. in St. Louis, which was engaged in the same business as H.T.I., and by March 1, 1960 she had switched four local hospital accounts from her former employer to appellant and was supplying a fifth hospital. She was an incorporator and one of three stockholders of appellant and is now its sole stockholder.

In December, 1959, Jay and Arnold Wells, who had a national chain organization engaged in leasing TV equipment to hotels and motels in 25 states, approached Tishman Realty and Investment Co. of St. Louis, to purchase the Wells business. Tishman formed a wholly owned subsidiary and bought Wells' holdings for $1,200,000 and one fifth of the stock of the subsidiary. The subsidiary later adopted the name of Wells Television, Inc. Within 9 months Wells had acquired some 250 hospital accounts over the country. On March 15, 1960, Wells acquired the eleven hospital accounts of Ball Radio in St. Louis and soon thereafter also secured the eight hospital accounts of Hospital Television Services, Inc., the former employer of Mrs. Dennis. Tishman furnished or procured the capital necessary for Wells to expand its national operations in hospital TV accounts, of which the latter had some five hundred by mid 1971. Wells standard contracts with the hospitals carried three clauses, *inter alia*, (1) a "right to match" provision giving Wells the option to meet any competitor's proposal made to one of its hospital accounts on the expiration of a Wells' contract; (2) a "not permitted" provision prohibiting any patient from bringing

a TV set into the patient's hospital room; and (3) an "ever green" clause requiring a 180-day prior notice requirement to terminate an expiring contract the failure to give which resulted in its automatic renewal. At the time of the filing of this suit in 1969, Wells had 17 hospital contracts in St. Louis, while appellant had four and six were self-operated or held by other rental concerns. There were 27 hospitals in the St. Louis area that were potential users of TV for their patients on a rental basis.

2. After a thirteen-day trial, the following issues were submitted to the jury under a charge to which no objection [other than above stated] was taken.[2] First, the jury was to determine the line of commerce to be either as appellant "contends, the rental of television sets to hospitals and hospital patients," or as appellees "contend, the rental of television sets to hospitals and their patients, as well as to hotels, motels, nursing homes and other customers using rental television." After which, the jury "must then determine whether the relevant geographic market" is, as appellant contends, "the metropolitan St. Louis Area" or as appellees contend, "nationwide; or whether the relevant geographic market is some other area." Third, whether or not the appellees have violated the antitrust laws by combining to restrict or unreasonably restrain trade in interstate commerce or by monopolizing, attempting to monopolize, combining or conspiring to monopolize the line of commerce in the relevant geographical market area.[3] And finally, the jury was directed

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[2] The instructions were in standard form, initially explaining the duties of jurors; the nature of the suit; the purpose, meaning and application of the Sherman Act, both Sections 1 and 2; the elements of proof necessary to show a violation of the antitrust laws; causation; damages, etc.

[3] In this connection the charge to the jury spelled out in detail the respective claims of the appellant, Wells and Tishman. Included were the claims of monopoly, attempt to monopolize and unreasonable restraint on Hospital Television; the issues as to cre-

that if it found that appellees, or either of them, had violated the antitrust laws in the line of commerce in the relevant geographical market area it found applicable, then it should direct its attention to whether or not such violations are or have been the proximate cause of any injury. The court then instructed on damages and gave the jury three alternate forms of verdict. The third form was: "We, the jury in the above-entitled cause, find the issues herein joined in favor of both defendants and against the plaintiff." The jury adopted it.

3. In view of this finding we can only conclude that the jury was of the view that the appellees had not violated the antitrust laws.[4] We, therefore, need only consider the single question raised by appellant as to whether the court erred in refusing to admit into evidence the longhand notes of Cidney Dade as to his solicitation of customers

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ation of Wells Television, Inc.; its acquisition of Ball Radio and Hospital Television Services in St. Louis; the clauses in the Wells hospital contracts i. e. "right to match", private sets "not permitted" etc.; all of which Hospital Television claimed was restrictive and Wells claimed was to protect its investment; "the right of first refusal" clause which Wells claimed was never invoked and Hospital Television claimed gave the contracts a perpetual existence; Wells' claim that its growth was through superior management etc. and that Hospital Television's failure was lack of business efforts, undercapitalization, refusal to furnish equipment necessary, lack of salesmanship, attempts to pressure customers etc. In short, the 30-page charge fairly submitted all of the issues to the jury. As we have said, there was no objection to the charge on these grounds but solely on the damage, if any.

[4] Exhibits 28 and 82 were the only pages actually offered. Ex. 28 relates a conversation between Dade and Alsop of Alexian Brothers Hospital. We note it quotes Alsop as expressing "extreme satisfaction with Wells" which is indicative of the hearsay character of all of the offerings. Ex. 82 related the incidence of a call Dade made to De Paul Hospital in July, 1965, which was beyond the limitation period of 4 years prior to suit. The efforts of appellant to secure both of these hospital accounts, *inter alia*, were related in Mrs. Dennis' testimony and the diary would have been cumulative at most.

for appellant. While Mrs. Dennis was on the stand, she identified a file that included a number of handwritten notes which were made by Dade and some of which were offered in evidence. They were offered under the Federal Business Records Law, 28 U.S.C. § 1732 (a).[5] The file included pages from a notebook that Dade wrote in diary form and had to do with calls that he made on prospects. Rather than calling Dade, who was in the courtroom, appellant sought to have the diary pages admitted into the record as official records of appellant. The court rejected the offer on several grounds: hearsay, *United States* v. *Burress*, 418 F.2d 677 (4 Cir. 1969); not a business record as contemplated by the Act, *Skogan* v. *Dow Chemical Company*, 375 F. 2d 692, 705 (8 Cir. 1967); *Bowman* v. *Kaufman*, 387 F. 2d 582 (2 Cir. 1967); *High Voltage Engineering Corp. v. Pierce*, 359 F. 2d 33 (10 Cir. 1966); the substance of the calls reflected in the diary were already in evidence through Mrs. Dennis and there could, therefore, be no prejudice; and the presence of Mr. Dade in the courtroom. An earlier deposition of Mr. Dade, not introduced at trial, indicated that he and Mrs. Dennis were on mawkish terms. In his deposition he stated that appellant's losses were caused by her failure to work on the hospital accounts assiduously and refusal to use improved installation equipment in the hospital room that would interfere less with the routine operation of the hospital as well as eliminate the risk of injury to patients, personnel and visitors. It appears that the effort to introduce the diary was to avoid placing Dade on the stand and risking this adverse testimony. We conclude that the court properly excluded the diary on the grounds noted.

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[5] The diary was required by the appellant and apparently was made in the regular course of business but was filled with hearsay and, in our view, was not within the contemplation of the Business Records Act. The presence of Dade in the courtroom at the time would, in any event, require his identification and explication of the proffered evidence in the light of its obvious dangers as well as its impingement upon the hearsay rule.

The remaining points raised by appellant have to do with damages. On a general verdict one never knows what the jury hung its verdict upon. But since it only considered the case for twenty minutes after its submission and since the court's instructions required a decision on liability first, it is fair to assume that it never reached the damage issue. We, therefore, do not consider those issues and the judgment is *Affirmed.*

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-458

HOSPITAL TELEVISION, INC., a Corporation,
Petitioner,

- v.

WELLS TELEVISION, INC., a Corporation, and TISHMAN REALTY & CONSTRUCTION COMPANY, INC., a Corporation,
Respondents.

RESPONDENTS' BRIEF

In Opposition to Petition for Writ of Certiorari to the United States Court of Appeals For the Eighth Circuit

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 462 F.2d 417 (1972).

QUESTIONS PRESENTED

The two questions presented for review in the Petition for Writ of Certiorari are dramatized, abstract inquiries not expressed in the terms and circumstances of the case. The issues, as stated, are not involved in this controversy. Petitioner's points should be restated as follows:

1. Whether, in this jury trial of a treble damage anti-trust case, the Trial Court properly excluded two damage exhibits offered by Petitioner which contained arbitrary percentage levels of receipts and pro forma profits based upon business which Petitioner alleged it might have taken away from defendant Wells.

2. Whether the instructions on causation and damages, read in context with the entire charge to the jury, properly stated the applicable legal standard, considering also that the evidence in support of the instruction was admitted without objection.

STATEMENT OF THE CASE

This suit took thirteen days to try. The jury, in approximately twenty minutes, returned a verdict in favor of both defendants.

The Eighth Circuit Court of Appeals in reviewing this complex record, without an appendix, unanimously affirmed the judgment, holding that there was no basis for error, and that the instructions fairly submitted all of the issues to the jury. Petitioner's statement of the case is misleading, and by virtue of its selective nature, presents an inaccurate view of the evidence and the proceedings below. It is necessary therefore to supplement Petitioner's statement.

Liability in this case was hotly contested. While the question was not reached by the Court of Appeals, Respondents argued vigorously that Petitioner failed to make a submissible case on the issues of conspiracy, effect on interstate commerce and proximate cause of damage. Petitioner also omits any reference to the controversy over the relevant market, and the fact that Respondents adduced substantial evidence to show, contrary to Petitioner's contentions, that: (1) the line of commerce was the rental of

television sets to all rental customers, including hospitals and hotels and motels; and (2) that the relevant geographic market was nationwide.

Petitioner operates primarily in St. Louis, Missouri, and rents television sets mainly to hospitals. Respondent Wells Television, Inc. ("Wells") competes in the television rental business on a national basis. It still rents sets to hotels and motels but, because of a stress in the hotel market and the competition from television manufacturers, began in about 1960 or 1961 emphasizing the rental of television sets to hospitals. Among the competitors of both Petitioner and Wells, for the hospital business in St. Louis, Missouri, are two manufacturers (RCA and Sylvania), and other independents (Evenview, Wittman and Lloyds) (T. 267, 268, 275).

Wells had contracts with less than 1 percent of the total hotels, motels and hospitals in the United States during the entire period in question. Wells share of the national market in hospitals only was 3.2% in 1960; 6.2% in 1965; and 7.4% in 1970. The Wells percentage of hospitals in its St. Louis region is 8%. Wells has only 20% of the market in short term acute care private hospitals within an 80 to 85 mile radius of St. Louis (T. 1497-1498; 1500; 1508-1511).

Plaintiff's failure to prove injury. Perhaps the most glaring deficiency in the plaintiff's case was its inability to prove the "fact of damage" or that plaintiff had suffered any injury proximately caused by any claimed violation. This case dealt with services, and under plaintiff's theories, these services were "highly personalized." Yet there was no showing that plaintiff (as distinguished from other competitors) would have obtained any of the Wells' hospital accounts—let alone how much profit plaintiff would have enjoyed.

Petitioner began business with an initial capitalization of $1,000 (T. 422). Sales increased from 1959 through

1965, at which time there was a dip in earnings due to the loss of an account to a competitor of Wells. From 1968 through the date of trial, Petitioner's sales continued to increase, and in 1970 its sales amounted to $92,292.00. Mrs. Dennis, Petitioner's sole stockholder, enjoyed a good income and other tax benefits from Petitioner and her affiliated companies.

Some of the contracts of Wells with its hospital customers contained clauses discouraging or preventing patients or other users from bringing private sets into the hospitals, and allowing Wells an opportunity to match a better bid from any other supplier that such hospitals might receive near the expiration of the current contract terms. There was absolutely no evidence that the "right to match" clause was ever invoked. Most of the hospitals held independent policies against the use of private sets by patients because of such factors as potential liability, volume control, and damage to the master antenna system or interference with reception. The private set clause made it easier for the hospitals to enforce their already existing policies (T. 6-7, 65, 87, 627, 1273).

Other contract clauses, relating to such matters as automatic renewal and exclusive dealing, were substantially identical to clauses in Petitioner's contracts, and Mrs. Dennis testified that these were reasonable means to protect an investment. The Wells' contract provided for its retention of title to the master antenna systems which it installed and maintained at some hospitals. The clause was never invoked, and no system has ever been removed (T. 346-347, 624).

The evidence demonstrated that television service to patients provides only a small portion of a hospital's income, and that the hospital administrators want a service that provides the required manpower and efficiency without the expenditure of its own resources. The

hospital administrators tend to retain the television supplier they have hired unless service is unsatisfactory. One way to measure service is by the number of complaints lodged by the patients. In the case of Wells, complaints were rare; the administrators were pleased with the Wells service, and have generally not sought out bids at the expiration of a contract (T. 69, 1274, 1350, 1364, 1373, 1395-1396).

Wells advertises extensively, has its own engineering department for research and development, has introduced various improved equipment into the market not offered by its competitors, and has performed extra services beyond its contractual obligations (T. 1455, 1469, 1475, 1478-1481). Since 1959, Petitioner has never won in any competitive bidding situation with any competitor (T. 403).

Respondents elicited testimony, over several days, from virtually every hospital administrator in the St. Louis metropolitan area to the effect that one reason they continued to do business with Wells was satisfaction with its superior service. Petitioner never once objected to the introduction of such testimony. In fact, the first two witnesses offered by Petitioner attested to the superior service of Wells.

Mrs. Dennis, who owned all of the stock of Petitioner, has done most of the selling for Petitioner. She admitted that she devoted only 15% of her working time to Petitioner, operating from one room and the basement of her home. Most of the hospital administrators could not recall solicitation of business by Petitioner. There was contradictory testimony by Mrs. Dennis, from which the jury could have justifiably concluded that her company engaged in no personal solicitation of hospital accounts between 1959 and 1965. There were infrequent, if any, solicitations by Petitioner of any hospitals from 1965

through the time of trial. Petitioner was not even listed in the yellow pages of the telephone book (T. 255-258, 307, 345, 406-409).

In 1964, Petitioner, not revealing that it was a television supplier, conducted a purported independent survey of hospitals for the undisclosed purpose of obtaining information about the contracts of the hospitals with Petitioner's competitors. Of all the hospitals surveyed, only one expressed dissatisfaction, and this hospital was not one being served by Wells. With the knowledge that all of the Wells customers were satisfied, Mrs. Dennis nevertheless wrote a letter to all of the hospitals serviced by Wells, indicating that Petitioner had been "favored with a stroke of good fortune" to receive the results of a confidential survey. The letter noted that the survey revealed one hospital was dissatisfied with its television supplier, and suggested that if the hospital to whom the letter was addressed was the one, Petitioner would like to discuss its services (T. 276, 282-284, 288-290).

The record discloses that when Mrs. Dennis wrote these letters to the hospitals serviced by Wells, she knew these statements were false, and that the hospitals were satisfied with the Wells service (T. 291).

The damage exhibits. Petitioner offered into evidence two charts relating to claimed monetary damages (Pl's. Exs. 321 and 321(a)). One chart covered a period beyond the applicable four-year statute of limitations, and both charts related to some hospitals that were not even included in the amended complaint.

Stating that it was impossible to determine which hospitals Petitioners might have obtained as customers from Wells, the accountant who prepared these charts acknowledged that he was arbitrarily directed by Petitioner's counsel to select 25%, 50%, 75% and 100% as the hypothetical and alternative percentage levels of the business

of Wells which Petitioner claimed it might have obtained (T. 847, 952).

The accountant admitted the conjectural nature of the estimates which served as a basis for his calculation of dollar amounts attributed to each of the four arbitrary percentages. He did not use actual cost figures on most of the Wells contracts in evidence, and made estimates of such factors as the actual number of Wells television sets in use rather than utilizing the actual figures in evidence (T. 853-859).

Prior to excluding the charts from jury consideration, the trial judge questioned Petitioner's counsel in regard to the exhibits. Petitioner's counsel acknowledged on the record that he had found no case precedent for admitting into evidence an exhibit that arbitrarily sets forth four percentage figures, that no feasible basis existed for claiming that Petitioner would have obtained one of the four selected percentages of the Wells' business, and that Petitioner might just as well have used any other percentage figures in its charts (T. 967-968).

The instructions on causation. Petitioner has omitted significant portions of the charge to the jury, including instructions relevant to its complaint about "the" proximate cause. The Trial Court defined proximate cause in a manner consistent with Petitioner's present contentions.

In the detailed charge which the Court of Appeals found to be fair, the Trial Court included the following instructions, given without any objection from Petitioner:

> "A person who acquires monopoly power through normal growth and development, as a consequence of having a superior product, or business acumen, or through historical accident, is not guilty of monopolization as defined in this charge (T. 1611).
>
> • • • • • • •

An injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case that the act or omission played **a substantial** part in bringing about or actually causing the injury or damage; and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission (Emphasis added, T. 1618-1619).

* * * * * * *

The position of the defendant Wells is: . . .

Three. That the plaintiff has suffered no damage as a direct result of a violation, if any, of the Anti-trust Laws; specifically . . . that plaintiff did not obtain the business of the customers because of its own lack of business efforts, . . . refusal to furnish the kinds of equipment necessary to sell the customers, lack of salesmanship, and attempts to pressure customers; . . . that in situations where customers of plaintiff, Wells, or other competitors, have renewed contracts without competitive bidding, such renewals have resulted from the fact that the customer is pleased with the service it has obtained and does not wish to change the service by obtaining another supplier; or because the customer has agreed to renew for other reasons, such as the addition of new or improved equipment'' (T. 1622-1624).

REASONS FOR DENYING THE WRIT

1. The Decision Below Does Not Conflict With Public Policy, Raises No Special and Important Issues, in No Manner Threatens the Future Effectiveness of Private Antitrust Actions, But Merely Recognizes the Complete Lack of Merit in Petitioner's Case.

Despite Petitioner's present assertions to the contrary, neither its appeal to the Eighth Circuit nor its present Petition to this Court raise special and important issues within the contemplation of U. S. Supreme Court Rule 19.

Petitioner's assignment of errors on appeal relate, on their face, to routine questions of admissibility of evidence and unsupportable challenges to the proximate cause and damage instruction. The true thrust of Petitioner's arguments have been even less substantial.

In essence, Petitioner has argued, and continues to argue, simply that the jury's verdict was wrong. Petitioner asserts (at page 10 of the Petition) that "proof of violation of the antitrust laws is overwhelming" so "the jury must and should have found that the violation caused injury" to Petitioner. We submit that proof of violation and injury was totally absent, and the jury's prompt resolution of the complex issues presented by plaintiff is the best evidence of that fact.

This Court has announced that it does not sit to satisfy a scholarly interest even in solid issues of substance for the sole benefit of the particular litigants involved. **Rice v. Sioux City Memorial Park Cemetery**, 349 U.S. 70 (1954). Only where there is an important principle in issue that the public interest requires to be settled, or where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal, does this Court intervene.

Petitioner attempts to fabricate a conflict and to magnify the importance of issues which are certainly not significant or special. Petitioner has failed to demonstrate that the Eighth Circuit has sanctioned a departure by the Trial Court from the accepted and usual course of judicial proceedings. There was no departure, and Petitioner received a fair and impartial jury trial.

Petitioner now argues that the court below paid insufficient heed to the difficulty of proving damages in private antitrust litigation. Yet, the jury was specifically instructed that "the circumstance that the precise amount of plaintiff's damage may be difficult to ascertain should not affect plaintiff's recovery, particularly if the defendants' wrongdoings have caused the difficulty in determining the precise amount." Appropriate recognition of this difficulty of proof cannot be transformed into the right to introduce admittedly speculative and arbitrary estimates of alleged possible damages that have no evidentiary basis. The unfounded "guesswork" exhibits were so obviously inadmissible for routine evidentiary reasons that it is inconceivable that any special or important damage question is involved.

In any event, the jury found in favor of Respondents, and the damage question need not even have been considered.

Petitioner's position turns upon the unwarranted speculation that the finder of fact must have ignored the above instruction, and rendered a verdict for Respondents on the liability issue, only because the jury did not want to bother with the task of calculating damages. However, no court is empowered to re-determine facts found by a jury, nor to search for one possible view of a case which will make a jury's findings inconsistent or contrary to the instructions. **Atlantic & Gulf Stevedores v. Ellerman Lines**, 369 U.S. 355 (1962).

Contrary to the assertion (at page 10 of the Petition) that "it is time for this court to clarify the law with respect to evidence of estimated damages in antitrust actions," this Court has long ago enunciated the damage standard to be applied in private antitrust cases. **Bigelow v. RKO Pictures**, 327 U.S. 251 (1946). That decision was applied here and was the basis of the instruction given by the Trial Court. Petitioner, inconsistent with its above-referred-to statement, has even acknowledged in its Petition (at page 12) that this Court has established a damage standard.

This case presents no issue of public concern that needs resolution, nor are any of the rulings below contrary to any accepted damage standard. The trial court simply excluded evidence that had no acceptable basis for admission.

2. **Petitioner Received a Fair Jury Trial, and the Denial of Admission Into Evidence of Four Arbitrarily Selected Estimates of Purported Possible Alternative Damage Figures Which Had No Evidentiary Basis in No Manner Conflicts With Any Decision of This Court.**

Through a curious reasoning process, Petitioner has expressed lack of faith in the jury, arguing, on the one hand, that the verdict is contrary to the overwhelming weight of the evidence, and, on the other, that Petitioner was denied a right to a full jury trial. The latter argument, premised upon the wrongful assumption that the damage charts were admissible, was not presented either to the Trial Court or the Court of Appeals, and is therefore not an appropriate consideration for this Court. **Neely v. Eby Construction Co.**, 386 U.S. 317 (1967).

Petitioner's attempt to equate the exclusion of two highly speculative damage exhibits from jury consideration with the complete denial of trial by jury of all the

factual issues as was condemned in **Beacon Theatres v. Westover**, 359 U.S. 500 (1959), can hardly be a serious effort. Indeed, Petitioner was defeated by the jury system itself.

No Trial Court ruling or instruction on any evidentiary or damage question conflicts with any pronouncement of this Court. There is no "right to jury trial" issue involved here, but merely a routine question of inadmissibility of speculative evidence.

In response to the Petition filed in this Court, it would be inappropriate to argue the merits of the case, and to detail at length the numerous reasons why the "damage exhibits" and related testimony were properly excluded from jury consideration. Suffice it to say that the damage exhibits were an attempt to convey to the jury that Petitioner had suffered a precise mathematical loss at one of the four arbitrary levels, starting with an absolute minimum of $71,152, when no damage at all had actually been proved. In **Herman Schwabe Inc. v. United Shoe Machinery Corp.**, 297 F.2d 906 (2d Cir. 1962), the court found damage exhibits were properly excluded because "the leap required to derive any rational conclusion from the expert's data was too great to allow a jury to take." The failure to offer a reasonable estimate of damage was due to the dearth of evidence underlying the projections made in the exhibits.

The jury had the available means for finding damages, if any. Sales figures of Respondent Wells and Petitioner's gross and net revenue figures were in evidence. Petitioner's accountant was permitted to testify as to the Wells' rates of return as applied to its revenues, and the actual rates of return of Petitioner were in evidence. Certainly, there was no deprivation of the right to jury trial.

Under the instructions, the jury could have found for Petitioner, and yet have found damages that Petitioner

would deem inadequate. It did not. The jury found for the Respondents because of the total absence of proof on the issues of liability and injury.

3. The Instructions on Causation Properly Stated the Applicable Standard, and Do Not Conflict With Prior Decisions of This Court or Those of Other Circuits.

Before both the Eighth Circuit and this Court, Petitioner has improperly isolated and taken out of context of the entire charge to the jury, the phrase "**the** proximate cause," as set forth in a portion of the causation and damage instructions. Petitioner completely omits the definition of proximate cause that was given to the jury (included herein in Respondents' Statement of the Case). In determining whether instructions correctly state the applicable law, the Court must consider them as a whole and not piece-meal or in isolation. See, **General Insurance Co. of America v. Hercules Construction Co.**, 385 F. 2d 13, 24 (8th Cir. 1967), and cases cited therein.

The jury was first instructed that Petitioner should recover if it suffered injury "as a direct result of some unlawful act by the defendants." Thereafter, the jury was told that "an injury . . . is proximately caused by an act, or a failure to act, whenever . . . the act or omission played **a substantial** part in bringing about . . . the injury . . . and that the injury was either **a** direct result or a reasonably probable consequence of the act of omission." This instruction is completely consistent with Petitioner's cases, with which we also agree.

The Trial Court's charge, read as a whole, could not conceivably have misled the jury into applying either a "sole cause" or a "more substantial cause" standard of causation. There was no misapplication of the rule announced, nor any departure from prior decisions of this Court.

Petitioner also now objects to what it refers to as the "customer satisfaction" provision of the causation and damage instruction. It is significant that Petitioner made no objection to the introduction of Respondents' substantial evidence related to customer satisfaction with the service of Wells. Yet, before the Eighth Circuit, Petitioner asserted that the "customer satisfaction" provision in the instruction interjected "monopoly begignity" as a valid defense to antitrust liability. Neither of the two Court of Appeals decisions cited by Petitioner provide any support for its misconstruction and misapplication of the facts and the law. Good faith motives and business excuses can be relevant unless there is a *per se* antitrust violation. **Cataphote Corporation v. DeSoto Chemical Coatings, Inc.**, 450 F. 2d 769 (9th Cir. 1971). But here, no *per se* antitrust violation was involved, nor was the evidence supporting the instruction in question offered to demonstrate Respondents' good faith motives as an excuse for a violation of the law.

Petitioner has confused the relevance of good faith motives on the issue of conspiracy or violation with the relevance of customer satisfaction resulting from superior service on the proximate cause and damage issue. We agree that customer satisfaction is no defense to any claimed *per se* antitrust violation. It is relevant on the issue of causation and damage.

Antitrust defendants are clearly permitted to present evidence that failure of a plaintiff to acquire more business was the result of plaintiff's own mismanagement, other economic conditions, or circumstances unrelated to improper conduct by the defendants. Existing case law allows defendants to explain and justify their positions on business success. See, e.g., **South-East Coal Company v. Consolidation Coal Company**, 434 F. 2d 767, 784-785 (6th Cir. 1970); **United Banana Company v. United Fruit**

Company, 172 F. Supp. 580, 587 (D. Conn. 1959), and cases cited therein. Growth, development and business success as a consequence of such factors as superior products, business acumen or historical accident have always been valid defenses to antitrust violation charges. **United States v. Grinnell Corp.**, 384 U.S. 563, 571 (1966).

The evidence, admitted without objection, as well as the instructions on causation and damages, properly stated the applicable law, and constituted no departure from any decision of other circuits. The following pronouncement of the Ninth Circuit in **Dahl, Inc. v. Roy Cooper Co.**, 448 F. 2d 17, 19 (9th Cir. 1971), is most appropriate in the circumstances of the present case:

> . . . [P]laintiff has no antitrust claim where its failure to obtain desired films is attributable to its own mistakes or failure to request them. . . . The only rational inference to be drawn from the record is that, as a newcomer with limited seating capacity, the Paris [plaintiff's theatre] simply could not compete effectively . . . We cannot escape the conviction that Dahl [plaintiff] really is complaining that it was not apportioned film by the distributors free from the necessity of competing for it."

CONCLUSION

There was no error below, and the Court of Appeals properly affirmed the judgment in favor of Respondents. Petitioner has not presented any reason why this Court should grant its Petition, and for the reasons stated, a writ of certiorari should be denied.

Respectfully submitted,

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